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Copyright Royalty Board

17 CFR Part 384

[Docket No. 17-CRB-0001-BER (2019-2023)]

Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (Business Establishments III)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges (Judges) publish for comment proposed regulations that set rates and terms for the making of an ephemeral recording of a sound recording by a business establishment service for the period January 1, 2019, through December 31, 2023.

DATES: Comments and objections are due no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments and objections, identified by docket number 17-CRB-0001-BER (2019-2023), by any of the following methods:

CRB's electronic filing application: Submit comments online in eCRB at <https://app.crb.gov/>.

U.S. mail: Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Overnight service (only USPS Express Mail is acceptable): Copyright Royalty Board, P.O. Box 70977, Washington, DC 20024-0977; or

Commercial courier: **Address** package to: Copyright Royalty Board, Library of Congress, James Madison Memorial Building, LM-403, 101 Independence Avenue SE,

Washington, DC 20559-6000. **Deliver to:** Congressional Courier Acceptance Site, 2nd Street NE and D Street NE, Washington, DC; or

Hand delivery: Library of Congress, James Madison Memorial Building, LM-401, 101 Independence Avenue SE, Washington, DC 20559-6000.

Instructions: Unless submitting online, commenters must submit an original, two paper copies, and an electronic version on a CD. All submissions must include a reference to the CRB and this docket number. All submissions will be posted without change to eCRB at <https://app.crb.gov/> including any personal information provided.

Docket: For access to the docket to read submitted background documents or comments, go to eCRB, the Copyright Royalty Board's electronic filing and case management system, at <https://app.crb.gov/> and search for docket number 17-CRB-0001-BER (2019-2023).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, by telephone at (202) 707-7658 or e-mail at crb@loc.gov.

SUPPLEMENTARY INFORMATION: In 1995, Congress enacted the Digital Performance in Sound Recordings Act, Public Law No. 104-39, which created an exclusive right, subject to certain limitations, for copyright owners of sound recordings to perform publicly those sound recordings by means of certain digital audio transmissions. Among the limitations on the performance right was the creation of a statutory license for nonexempt, noninteractive digital subscription transmissions. 17 U.S.C. 114(d).

The scope of the section 114 statutory license was expanded in 1998 upon the passage of the Digital Millennium Copyright Act of 1998 (DMCA), Public Law No. 105-34, which allows public performance of a sound recording when made in accordance

with the terms and rates of the statutory license, by a preexisting satellite digital audio radio service or as part of an eligible nonsubscription transmission. 17 U.S.C. 114(d).

The DMCA also created a statutory license for the making of an “ephemeral recording” of a sound recording by certain transmitting organizations. 17 U.S.C. 112(e). This license, among other things, allows entities that transmit performances of sound recordings to business establishments to make an ephemeral recording of a sound recording for later transmission, pursuant to the limitations set forth in section 114(d)(1)(C)(iv).

Chapter 8 of the Copyright Act requires the Copyright Royalty Judges (Judges) to conduct proceedings every five years to determine the royalty rates and terms for “the activities described in section 112(e)(1) relating to the limitation on exclusive rights specified by section 114(d)(1)(C)(iv).” 17 U.S.C. 801(b)(1), 804(b)(2). Accordingly, the Judges published a notice commencing the current proceeding and requesting that interested parties submit petitions to participate. 82 FR 143 (Jan. 3, 2017).

The Judges received Petitions to Participate from Mood Media Corporation, Music Choice, David Powell, David Rahn, Rockbot, Inc., Sirius XM Radio Inc., and SoundExchange, Inc. The Judges initiated the three-month negotiation period and directed the participants to submit written direct statements no later than May 14, 2018. *See* 17 U.S.C. 803(b)(3).

On May 4, 2018, the Judges received a Motion to Adopt Settlement stating that all participants¹ had reached a settlement obviating the need for written direct statements or a hearing.

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt royalty rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided they are submitted to the Judges for approval. The Judges must provide “an opportunity to comment on the agreement” to both participants and non-participants in the rate proceeding who “would be bound by the terms, rates, or other determination set by any agreement...” 17 U.S.C. 801(b)(7)(A)(i). Participants in the proceeding may also “object to [the agreement’s] adoption as a basis for statutory terms and rates.” *Id.*

The Judges “may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement,” only “if any participant [to the proceeding] objects to the agreement and the [Judges] conclude, based on the record before them if one exists, that the agreement does not provide a reasonable basis for setting statutory terms or rates.” 17 U.S.C. 801(b)(7)(A)(ii).

Royalty rates and terms adopted pursuant to section 801(b)(7)(A) are binding on all copyright owners of sound recordings and all business establishment services making an ephemeral recording of a sound recording for the period January 1, 2019, through December 31, 2023.

The public may comment and object to any or all of the proposed regulations

¹ Despite filing a Petition to Participate, David Powell did not participate in the negotiations and did not join in the agreed settlement. The Judges make no finding with regard to Mr. Powell’s eligibility to participate in this proceeding. Mr. Powell may, of course, respond to this notice. To the extent Mr. Powell has an interest in the business establishment services license, he will be bound by the royalty rates and terms the Judges adopt ultimately.

contained in this notice. Comments and objections must be submitted no later than [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

List of Subjects in 37 CFR Part 384

Copyright, Digital audio transmissions, Ephemeral recordings, Performance right, Sound recordings.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend part 384 of chapter III of title 37 of the Code of Federal Regulations as follows:

PART 384—RATES AND TERMS FOR THE MAKING OF EPHEMERAL RECORDINGS BY BUSINESS ESTABLISHMENT SERVICES

1. The authority citation for part 384 continues to read as follows:

Authority: 17 U.S.C. 112(e), 801(b)(1).

§ 384.1 [Amended]

2. In § 384.1 amend paragraph (a) by removing “January 1, 2014, through December 31, 2018” and adding “January 1, 2019, through December 31, 2023” in its place.

3. Amend § 384.3 by revising paragraph (a) to read as follows and in paragraph (b), removing “\$10,000” and adding “\$20,000.”

§ 384.3 Royalty fees for ephemeral recordings.

(a) *Basic royalty rate.* (1) For the making of any number of Ephemeral Recordings in the operation of a Business Establishment Service, a Licensee shall pay a royalty equal to the

following percentages of such Licensee's "Gross Proceeds" derived from the use in such service of musical programs that are attributable to copyrighted recordings:

Year	Rate
2019	12.5%
2020	12.75%
2021	13.0%
2022	13.25%
2023	13.5%

(2) "Gross Proceeds" as used in this section means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings during the License Period pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of:

- (i) For classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program; and
- (ii) For all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

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§ 384.5 [Amended]

4. In § 384.5 amend paragraph (d)(4) by removing the second comma before the word "subject".

Dated: May 11, 2018.

Suzanne M. Barnett,
Chief Copyright Royalty Judge.

[FR Doc. 2018-10509 Filed: 5/16/2018 8:45 am; Publication Date: 5/17/2018]